Blowing the OHS Whistle

Workers are unafraid of blowing the whistle on poor OHS practices – so how can employers protect themselves?
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16 There have been a number of incidences in which workers have felt the need to blow the whistle on poor OHS practices. Craig Donaldson speaks with a number of experts about this issue and looks at how employers can avoid cases of OHS whistleblowing through good OHS policy and practice.

10 In the final edition of OHS Professional for 2009, Pam Pryor reviews the year for its impact on OHS education; and it has been a big year.

20 Fraudulent workers’ compensation claims have long been a thorn in the side of employers and their insurers. Craig Donaldson looks at such fraud and asks what employers can do about it.
Hold on to priceless ideas

This 60th Anniversary Year has been a great success for the Institute, with many achievements of which we can be proud. With more than 60 events, large and small, attendances at conferences and the companion trade shows continue to grow and this year your division executives organised outstanding events in Melbourne, Brisbane, Sydney and Townsville. Through HaSPA (The Health and Safety Professional Alliance, based in Melbourne) the National Administration and Executive is managing the $391,400 Body of Knowledge project, funded by WorkSafe Victoria. Not least of the achievements has been the attraction of more than 1000 new members, which is a testimony not only to the value of the various high-profile events that the Institute delivers but also the hard work of your executives and the administrative teams behind them.

A landmark event in this 60th year has been the launch of the Institute’s new peer-reviewed journal. Through the relationship with our new publisher, LexisNexis, we are now publishing a revised e-news, the OHS Professional magazine and the brand new journal. The e-news is still taking shape and in the New Year we look forward to a fully revised and fresh-looking publication appearing on your computers screens.

While I have received much positive comment in regard to the peer-reviewed journal, a few members have expressed some consternation and have questioned the value of papers of an academic nature in the everyday practice of health and safety. Instead they have referred to the value of personal experience and sharing of ideas among individuals in their approach to preventive activities.

The value of hard-won experience is unquestionable and many readers will be familiar with my repeated calls for the resurrection of the national solutions database. The loss of the immense store of priceless ideas that has resulted from the decision to close the internet-based resource is tragic and I still hold onto the hope that one day we will see the reinvention of this resource in some form.

Notwithstanding the value of personal experience and the sharing of ideas, scholarly work is central to the development of an evidence base that may be drawn on to inform practice as well as further research, the refinement of ideas, the contradiction of existing ideas and the creation of new ideas.

The fact that the Institute is now publishing a scholarly peer-reviewed journal cements its place on the world stage as a professional body comprising professionals that base their practice on sound ideas drawn from a robust evidence base. This peer-reviewed journal provides an avenue for sharing the findings of research, challenging ideas and documenting evaluated solutions. It will draw the attention of people all over the world involved in health and safety to the Institute. But it is not just retrospective. Scholarly publications, through their citations, draw the attention of readers to the work and writing of others in different international journals and in other disciplines.

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A peer-reviewed journal does not supplant individual ideas and the sharing and discussion of practical experience at enterprise or community level; rather it complements and augments this and informs scientific debate as well as the knowledge development. As we all anxiously observe the debates among our leaders at the Copenhagen summit this month, none of us can fail to appreciate the role that rigorous, scientific research and its peer-reviewed publication play in human and environmental health and safety.

As the Copenhagen summit concludes, the Christmas holidays will be upon us and I hope we can move into this period with optimism and confidence.

Best wishes to all readers for a safe and healthy New Year.

Dr Steve Cowley, FSA

Editorial Note

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Dr Steve Cowley, FSA
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"IT WAS TOO EASY TO GET CERTIFIED" SAYS INSULATION INSTALLER

The first of the insulation installers to be deregistered from the Government’s Home Insulation Program have been listed last week on a public website.

The move comes as pressure has been put on the Government to tackle non-compliance with the insulation program requirements because three young insulators have died in separate incidents since the program began.

“The consequences of dodgy behaviour for insulation businesses just got a lot tougher,” said Environment Minister Peter Garrett. “There’s no room in this program for businesses who aren’t willing to stand publicly by the quality of their work and who tarnish the work of reputable, hardworking installation businesses.”

Many people, however, have blamed the Government for not imposing tighter regulations from the outset.

One certified insulator who set up his business when the program was announced by the Government in July said that it was really easy to set up an insulation business and cash in on the huge profits that the Government was offering.

“You can do courses online now,” he said. “When I set up six months ago all you needed to do was a course which was basically two half-day courses,” said the registered insulator. “This course didn’t include any practical training. It was supposed to, but it never eventuated.”

This course, along with the usual public liability and workers’ compensation cover was all he said he needed to get started and start insulating houses.

“After two weeks I was issued with my registration pack and work order forms and information about the scheme,” he said. Among the changes to the scheme that commenced this week are that installers must get at least two independent quotes which are based on a physical site inspection before proceeding to have insulation installed. When the program commenced just one quote was needed.

“At that time there was only one quote required so you could just rock up to any house and insulate there and then,” said the insulator. “Also, the actual insulators themselves don’t need to have done the insulation course, just the person signing off on the job.”

He continued to say that the safety guidelines that have been set out aren’t being followed by many insulation companies which have set up since the scheme began.

“You are supposed to do a job safety analysis and write down how you’re going to deal with any potential safety issues,” he said. “But it’s not being done because it’s not being monitored.

“There is a massive cash grab going on and a massive rush to get as many houses [as possible] done before the scheme runs out,” he said. “Unfortunately, due to the nature of the scheme and the potential profits, it leads to many cowboy operations and, consequently, tragic incidents like what happened to the three young insulators.”

The Government has urged householders to shop around until they find a registered installer they’re happy with and to ensure they’re choosing the right product and installation options for their circumstances.

They have also urged householders to only sign the work order form when they are satisfied with the work that has been done.

The problem though, according to the insulator, is that the Government is paying out on these schemes very quickly so sometimes insulators aren’t audited until months after they’ve been paid, and by then they may be unable to be contacted.
ALCOHOL IN THE WORKPLACE IS A SERIOUS, YET HIDDEN PROBLEM

Employers need to be mindful of the effects of alcohol on safety and productivity - particularly during the festive season – warns Frontline Diagnostics.

A recent report commissioned by the federal Department of Health & Ageing detailed that one in 10 workers said that they usually drank alcohol in the workplace and 6.6 per cent said they had turned up for work drunk in a 12-month period.

The report also said that the bill for lost productivity through hangovers and sick days, staff turnover and early retirement due to alcohol use is calculated at $5.6 billion a year.

“Testing is particularly important where there are safety issues like in the mining, construction, transport and manufacturing sectors,” said Frontline Diagnostics’ General Manager, Richard Varnish. “These industries are often already testing for drugs and alcohol testing becomes part of their regular screening.”

“Alcohol is not just a safety issue. During the festive season, there are more employer-organised events that involve alcohol and often staff feel pressured into consuming alcohol within a work peer group. The consequences of this can be far-reaching.”

INCREASE IN WORK-RELATED DEATHS

Workplace fatalities have increased by 14 per cent this year, a report released today by Safe Work Australia has found.

In 2008-2009 there were 177 notified work-related fatalities – an increase from 158 for the previous 12 months.

“This increase in fatalities demonstrates the need for all Australians to focus on safety in the workplace and undertake measures to improve safety standards,” said Safe Work Australia Chair Tom Phillips. “In a country such as Australia fatalities should be decreasing. These figures reinforce the message that safety should be everybody’s number – one priority.”

Mining, agriculture, forestry and fishing were the industries with the highest increase of fatalities, and had the highest level of workplace deaths since records commenced in 2003.

The report, Notified Fatalities Statistical report 2008-09, also revealed that just in excess of half of all work-related injury fatalities resulted from vehicle incidents.

A total of 453 work-related traumatic injury fatalities occurred in Australia during 2006-07 and, of these, 295 died of injuries sustained while working; 93 workers were identified as having died while commuting to or from work and 65 bystanders were identified as having died as a result of someone else’s work activity.

“By publishing data from a range of data sources, Safe Work Australia demonstrates a commitment to providing the best possible information to improve workplace safety,” said Phillips.

National Review Update

Last year Julia Gillard announced her plans to create a national OHS system for Australia. At the end of September, the Safe Work Act 2009 was released, the aim of which is to harmonise the currently disparate laws which exist across different jurisdictions in Australia. This is a monumental task.

To put it in perspective, some jurisdictions currently provide for penalties of up to 7 years imprisonment for breaching OHS legislation; while others provide for a mere fine of up to $60,000. It is therefore unsurprising that not all states and territories are on board so far, with WA expressing its distaste for a national system quite vocally in the media.

In short, the model Act is radically different from the current NSW OHS Act and prescribes a broader duty of care for a broader scope of people.

Penalties under the model Act are set up according to three categories or levels of seriousness. The maximum penalty for an officer is $600,000 and/or 5 years imprisonment which is at the weighty end of the scale when compared to the penalties which currently exist across Australia.

Workplaces will designate “Health and Safety Representatives” to represent “work groups” or workers on OHS matters. Notably, the HSR is given the power to direct a worker to cease work if they have reasonable grounds to believe that continuing work will pose serious risk to the worker’s safety. Vesting this level of power in safety representatives has enormous implications for businesses both on a practical and economic level.

The public was invited to comment on the model Act in November and 480 submissions were made. Safe Work Australia is expected to agree on the model provisions by 30 March 2010.

Bridget Cormack, LexisNexis
Fellows Investiture

STEVE COWLEY

The magnificent Admiralty House and its beautiful gardens provided the perfect surroundings for the recent ceremony during which Governor-General met, and conferred gradings on, a large group of Fellows and Chartered Fellows.

During national Safe Work Australia Week in October, 31 Fellows and Chartered Fellows attended the ceremony at Admiralty House. The Governor-General, Her Excellency Ms Quentin Bryce AC, warmly welcomed the party to her Sydney residence, drawing attention to the magnificent architecture of the building as well as the location on Sydney Harbour. The Governor-General is our patron and it was clear from her thoughtful address to the group that she understands and appreciates the work of the SIA and its members in injury and disease prevention.

During a morning of both formality and congeniality each Fellow and Chartered Fellow was introduced to the Governor-General and presented with a certificate before joining family and friends for morning tea on the lawns of the beautiful gardens. The spectacular views directly across the harbour into the Opera House; to the right up to the harbour bridge; and to the left Fort Dennison; and the beautiful two-storey house with colonnaded verandah behind, made a perfect setting on this warm spring morning. The Governor-General and her husband, His Excellency Mr Michael Bryce AM AE, mingled with their guests and demonstrated a genuine interest in the roles and work of the members and their families, before concluding the event with a group photograph within which the faces clearly portray and record the mood of the day. The party departed Admiralty House and attended a Fellows lunch before rejoining the Sydney Conference.

Since the event, many of the party have expressed how much they appreciated its significance and enjoyed the collegial and convivial atmosphere at Admiralty House. The Governor-General has expressed interest in conducting further ceremonies for our new Fellows and our National Administrative team is already pursuing this with her staff. The institute is privileged that the GG is our patron and values our work in injury and disease prevention.

New H&S Journal

STEVE COWLEY

A landmark event in the Institute’s calendar this year has been the launch of a new peer-reviewed journal, the Journal of Health and Safety Research and Practice.

This new scholarly publication is to be published twice a year and is distributed to members. Non-members and libraries may subscribe to the journal. Already we have received very positive feedback from readers and those downloading electronic versions of the articles from our members’ area of the website are professionals who have pointed corporate colleagues in their organisations to the documents and used these as a catalyst for debate.

At the time of publication of each subsequent edition, the papers from the previous edition will be moved to the public area of our website, enabling free public access. Such free or “open access” offers a number of benefits to the Institute. There is evidence that open access increases citation rates and increases knowledge sharing; it will also attract more non-members to our website and thus further promote the Institute and its activities.

The value of the journal was recently acknowledged by our Patron, Her Excellency Quentin Bryce. Immediately before the Fellows Investiture at Admiralty House in October during a private meeting, the Governor-General took receipt of the first copy of the journal from the National President, Mr Barry Silburn; the Dean of the College of Fellows, Dr Geoff Dell; the Registrar of the College of Fellows, Mr David Skegg, and the Editor In Chief, Dr Steve Cowley. The Governor-General was extremely interested in the genesis of the new journal and wished the Institute every success with the publication.
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The Spirit of Safety
In February this year the National Board of the Safety Institute of Australia reviewed the criteria for professional grading to determine that the educational requirements for professional grading (CPMSIA and above) for new members would be a bachelor degree in OHS or graduate diploma or masters in OHS.

There are currently four universities offering bachelor degrees in occupational health and safety, with the University of Queensland introducing a bachelor program in 2010. The University of NSW offers a bachelor degree in Safety Health and environment (SHE). A summary of each program is given on the SIA web site.

Entry level OHS professional education is also provided by a number of universities at the postgraduate level and is open to suitably qualified persons. Information on the universities offering these programs can be found through the Course Finder on the SIA website.

A forum of OHS educators was held in Sydney in April as part of the project Mapping the strengths, challenges and gaps toward sustainable improvements in OHS education. This forum, attended by more than 30 educators from 15 universities, resulted in the “Sydney Declaration” advocating for a formalised academy of OHS education and research that focused on the role of universities.

In July, the final report on the project Mapping the strengths, challenges and gaps toward sustainable improvements in OHS education was submitted to the Australian Learning and Teaching Council. The SIA OHS Educators’ Chapter has been a formal partner in this project and once the report is released by the ALTC a copy will be placed on the SIA website. The resultant guidelines for future education of OHS generalist professionals included the need for university-level education, a multidisciplinary grounding, and a work-integrated model of learning.

July also saw the announcement of funding by WorkSafe Victoria for development and implementation of a core body of knowledge for generalist OHS professionals. This is a two-and-a-half-year project and, while funded and managed from Victoria, is a national project. Information on this project is available on the SIA website with updates issued regularly. A national forum of OHS educators will be held in Melbourne in February as part of this project. Consultation activities with other groups will occur during 2010.

The November meeting of the SIA National Board of Management approved a change of governing rules for the Chapter...
to retitle it the SIA OHS Education Chapter comprising the SIA-Academy of University OHS Education and Research and the SIA-Vocational and Workplace Training Group. The revised rules for the Chapter are available on the SIA website. This change in rules paves the way for an increase in activity and profile for both the Academy and the Vocational and Workplace Trainers’ Group in 2010.

The developments around changes to the grading criteria, the development of the body of knowledge, and decisions by international OHS professional bodies has revealed that the difference in roles of OHS professionals and OHS practitioners has never been systematically analysed.

To this end, the SIA College of Fellows and the OHS Education Chapter has jointly prepared a project plan to be implemented in 2010 for a consultative process to clarify the scope and responsibilities of these roles. This activity will inform the Body of Knowledge project and also provide a basis for review of the role of vocational education for OHS practitioners.

With such an exciting year in OHS education it is appropriate to review where we have come from. To this end, a “retrospective” summary of the educational and professional journey for OHS professionals and practitioners has been developed and is presented below.

Pam Pryor  
Secretary, SIA OHS Education Chapter

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<tr>
<th>A history of OHS education</th>
<th>OHS education</th>
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<tr>
<td><strong>Pre 1970s</strong></td>
<td>The first safety-related course in Australia, the Safety and Accident Prevention course was conducted in Melbourne 1949. The Safety Certificate course, developed by the then Safety Engineering Society of Australia, was set up at a Victorian technical college which served as a model for other States.</td>
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<td>1970s</td>
<td>The lack of uniformity of safety courses across Australian States inhibited the development of the profession. The need for specialised OHS qualifications was identified and endorsed by the government and further safety certificate courses were set up in Queensland and NSW. The first OHS course by “distance” was offered in Victoria.</td>
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<td>1980s</td>
<td>The first tertiary OHS course began at the then Ballarat College of Advanced Education. Curriculum guidelines for OHS education in Australia were developed through a workshop of OHS educators. Safety Institute of Australia reviewed and accredited all OHS courses in Australia. By the end of the 1980s 13 tertiary institutes were teaching OHS.</td>
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<td>1990s</td>
<td>There was a plethora of OHS qualifications; graduate diplomas and masters, plus the appearance of undergraduate degrees. The first national conference of OHS educators from Australia and New Zealand was held in 1994. Publication of a guidance note on tertiary level OHS courses was a controversial attempt to bring some consistency to OHS courses. There was little interest in OHS education by the regulators.</td>
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<td>2000s</td>
<td>OHS was generally studied as a secondary discipline by mature age students on a part-time, fee-paying basis. While 17 Australian universities offered OHS qualifications OHS was not valued as a discipline within universities and there was difficulty in obtaining qualified and experienced OHS educators. The demise of OHS degree programs threatened the acceptance of OHS as a profession and the availability of researchers and future educators. Nationally endorsed competencies were developed for OHS practitioners. There was a lack of an agreed core body of knowledge and an emphasis on distance teaching mode. In 2008 the Australian Learning and Teaching Council funded a study to map the strengths, challenges and gaps in OHS education. Also the Victorian OHS regulator facilitated and resourced the Health and Safety Professionals Alliance of OHS professional bodies and OHS educators.</td>
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Professional recognition

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<th>1970s</th>
<th>Professional membership (MSIA) required an approved tertiary qualification or by meeting other approved criteria.</th>
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<tr>
<td>1980s</td>
<td>Professional membership required vocational level OHS diploma plus 5 years experience or a bachelor degree or graduate diploma in OHS plus 3 years experience. Chartered Fellow assessed grading introduced.</td>
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<tr>
<td>2000s</td>
<td>Associate member (ASIA) grading and any recognition of the Certificate IV in the grading criteria removed. Professional membership (CPMSIA) required tertiary qualification in OHS or a Diploma plus experience. An outcome of the alliance of OHS professional bodies and educators (HsAPA), set up and sponsored by WorkSafe Professional grading criteria for SIA revised to require a bachelor degree, graduate diploma or masters in OHS plus 3 year OHS experience.</td>
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Occupational health reports: top 10 tips

Need to write an OH report? Ken Addley, Isobel Hannah and Patricia McQuillan offer some practical advice.

The sickness absence occupational health report is one of the key interfaces between the occupational health practitioner and human resources.

Needless to say the report should be clear, focused and appropriate to the context of the employer, the employee and their workplace.

A brief website survey revealed little comprehensive guidance available on the theme of how to compile an occupational health report. The following attempts to identify some of the main points that may be useful to those compiling such a report on the assessment of those absent from work due to illness or injury.

The tips
The top 10 tips for preparing an occupational health report are:

1. It must be in writing, using language that can be easily understood by a non-medical audience and be of practical value to personnel/management and the employee.

2. It should be focused and deal with matters of employment and fitness for work.

3. With the employee’s consent, it should contain relevant and appropriate medical information, including any interventions being planned to allow HR/management to achieve a full understanding of the employee’s situation.

4. It should include details of any functional limitations or relevant disabilities that may temporarily or permanently affect the employee’s ability to carry out their job.

5. If the employee is absent, guidance in relation to the timescale for a return to full or restricted duties should be provided, expected duration of any limitations and whether a review is necessary.

6. It should indicate if further information needs to be obtained from the employee’s general practitioner or hospital doctor to enable a better understanding of the underlying medical condition to be attained.

7. It should advise whether the condition is likely to be covered by disability discrimination legislation and if adjustments to the job would be appropriate, and if these are likely to be temporary or permanent.

8. It should indicate if it appears that the employee’s medical condition is related to their work, including any allegations of internal disputes that may require management assessment.

9. It should provide an opinion on the impact of the employee’s health condition on future attendance or performance and whether retirement on health grounds may be appropriate.

10. It should indicate if a case conference with HR or management would be helpful, or if a workplace visit would provide further information that would assist in providing advice.

The above may be helpful in structuring an OH report. More debate is needed on this issue - namely what should a good report contain?

From the employer’s perspective, the benchmark is whether or not the report assists them in their ongoing management of the case. This may include dealing with issues of disability, managing a return to work or ongoing absence, or preparing for termination of employment on health grounds.

The OH practitioner should be assisting the employer by providing timely, relevant and appropriate reports. That being said, the practitioner may feel constrained by issues of confidentiality which may lead to a report that contains little or insufficient information.

The key here is to ensure that the employee understands the process in which they are engaged and that written informed consent for a report to be prepared has been obtained.

In conclusion, the key stakeholders in this important interface, occupational health advisers and HR managers, need to continue to engage in the debate and to come together to share each others’ experience and identify their needs.

Ken Addley is director of Northern Ireland Civil Service Occupational Health Service, Belfast; Isobel Hannah, occupational health nurse; and Patricia McQuillan, assistant director nursing. Courtesy of Personnel Today. www.personneltoday.com
Legal Professional Privilege and OHS

Mark Waters, Elizabeth Kenny and Sue Bottrel analyse the implications the Kwikform case had on employers and what they should do when seeking to rely on documents and communications as being subject to legal privilege.

In the recent case of Nicholson v Waco Kwikform Limited (the Kwikform case) the NSW Industrial Relations Commission (NSWIRC) found that Kwikform’s incident investigation report was protected by legal professional privilege and therefore was not admissible as evidence in Court. The decision provides some interesting consideration of what does or does not qualify communications and documents as legal professional privileged.

To claim legal professional privilege, communications must be:
• confidential between a client and its legal representative; and
• for the dominant purpose of giving or seeking legal advice, or the provision of legal services, including anticipated litigation and representation in court.

Legal professional privilege cannot be claimed as a blanket protection and does not extend to communications or documents prepared prior to seeking legal advice or before legal proceedings are anticipated.

In determining if a document/communication is subject to legal professional privilege, the Court will generally consider the circumstances surrounding the production of the document (including any reasons other than privilege) and the intent of the person who requested, created or commissioned the document or communication.

Kwikform’s solicitors were engaged to provide advice about an incident which resulted in the death of an employee earlier that day. Kwikform’s solicitors subsequently requested that Kwikform produce several documents to “assist them in providing legal advice” in relation to the incident, including an incident investigation, the results of which would be provided to the solicitors.

WorkCover issued proceedings to determine whether the documents produced by Kwikform were subject to legal professional privilege. At the time of the hearing, no litigation had commenced.

WorkCover argued that the documents were not produced for the dominant purpose of seeking legal advice or for use in legal proceedings. Rather they were produced for multiple purposes including:
• conforming with Kwikform’s internal procedures requiring that all accident and injuries be reported;
• detecting if there were any faults in the system of work; and
• ascertaining if there had been any breaches of Kwikform’s policies by employees or subcontractors.

No evidence was called by WorkCover to support its assertion of “other purposes.” It submitted it “was a matter of common sense and logic.”

The prosecution sought to rely on a various judgements which found that there may be a number of purposes for producing communications of this type, but where the sole or dominant purpose was not for seeking legal advice or the provision of legal services, it was not subject to legal professional privilege.

The NSWIRC determined that it was clear that litigation was anticipated in relation to the incident, as demonstrated by Kwikform’s early engagement of solicitors to provide legal advice and as outlined in correspondence between Kwikform and it’s solicitor. It is also clear that the solicitors purpose in commissioning the report was to enable them to provide advice as to the legal aspects of the matter.

The NSWIRC considered the argument that the documents were produced for multiple purposes, and found that it was unable to be sustained.

“...The documents (or more relevantly the communications contained in the documents) were commissioned by solicitors. Matters of accident and injury reporting were therefore unlikely to be more than a peripheral concern. The dominant, if not only purpose set out in the letter, for the preparation of these documents was for the provision of legal advice.”

This was also evidenced by the marking of each document as “privileged and confidential.”

The appeal was allowed and the claim of legal professional privilege was upheld.

Implications for Employers

The Kwikform case reinforces that in determining if a document is subject to legal professional privilege, the dominant or most important purpose for bringing the document into existence should be obtaining legal advice, but it need not be the only purpose.

When seeking to rely on documents and communications as being subject to legal privilege, employers should:

• Consider which incidents are likely to require urgent legal advice, or have the potential for legal proceedings (eg. when a regulator commences an investigation into a workplace incident).

• Notify their solicitors immediately upon the occurrence of such an incident and instruct them to lead the investigation.

• Carefully consider the content and purpose of communications between the employer and their solicitors.

By Mark Waters (Partner), Elizabeth Kenny (Lawyer) and Sue Bottrel (Lawyer) Piper Alderman.
Avoid the Christmas party “hangover”

Every year practitioners deal with the “hangovers” from office parties, which frequently end up in court and discrimination/industrial tribunals. Richard Thompson and Josh Strong provide some useful tips which will provide some coverage and foster a culture of respect and personal responsibility in the workplace.

It is not possible for an employer to cover every possible thing that could go wrong at an office Christmas party, however employers may take protective steps by issuing a written statement beforehand setting out rules and an acceptable standard of behaviour. The following points should be kept in mind when preparing such a statement for staff:

- Note the start and finish time of the party.
- Encourage personal responsibility in the consumption of alcohol, and make it clear that individuals will be held to account for their behaviour.
- Note that if an employee is asked to leave by the employer due to intoxication, the employee must leave.
- Make it clear that any behaviour that is discriminatory, offensive, demeaning or sexually inappropriate will not be tolerated (this includes giving inappropriate gifts).
- Make it clear that misconduct at the Christmas party could result in disciplinary action, including demotion or dismissal.

In addition, employers should take the following steps to ensure the safety of staff and reduce the risk of legal action:

- Assign a function organiser, who should remain sober throughout the event.
- Ensure that there are no OH&S concerns in relation to the venue.
- Provide alternatives to alcohol, such as soft drink and water.
- Ensure that there is plenty of food.
- Ensure that you are meeting your obligations with respect to responsible service of alcohol (including having accredited servers and not serving intoxicated people).
- Provide non-glass drinking containers where possible.
- Ensure that there is a safe and easy means for the employees to get home, which may involve providing cab charges.
- Be prepared to deal with any complaints on the night, and don’t dismiss complaints on the basis that “everyone was a bit drunk”.

How to avoid Christmas party disaster

The Christmas party season is just around the corner, and after a rather stressful, tumultuous year, it’s likely to be even more keenly anticipated than in more prosperous years gone by.

But for employers, Christmas party fervour can quickly turn sour if they’re not aware of, and prepared for, the legal risks and liabilities they potentially face if things go awry.

Thomson Playford Cutlers partner Tony Vernier explained that attendance by employees at a work Christmas party or function is considered to be “in the course of employment”, and, as a result, employers have legal obligations to their employees.

Significantly, says Vernier, employers need to be aware that those obligations may extend beyond the period of the Christmas party itself. “There’s a grey area … does it just involve the Christmas party? Or the party after the Christmas party? You need to be very careful [in considering] when the employment connection ends,” he says. “You’ve got to look at a variety of factors … such as where the function is held. Who paid for it? Who organised it? Where was it advertised? Who controlled it? Who paid for and provided the alcohol?”

By Zoe Lyon. For the full story see www.hrleader.net.au
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There have been a number of incidences in which workers have felt the need to blow the whistle on poor OHS practices. Craig Donaldson speaks with a number of experts about this issue and looks at how employers can avoid cases of OHS whistleblowing through good OHS policy and practice.

OHS whistleblowing conjures up images of dodgy backyard sweatshops, unscrupulous bosses counting their tidy profits while uneducated factory workers toil away for minimal pay and old industrial mills in which safety cautions are thrown to the wind at the expense of ever-increasing output.

While business has come a long way with OHS standards, there are still a number of areas for improvement and workers have proved themselves unafraid of blowing the whistle on sub-standard OHS practices if required.

Over the past two years WorkCover NSW has seen a slight reduction in the number of complaints in relation to OHS issues across the state’s workplaces. In 2008/09 there were 8537 OHS-related complaints reported to WorkCover – a decrease of 4 per cent over the previous financial year, when 8902 complaints were reported.

“The numbers demonstrate that workers feel they can raise health and safety issues with WorkCover when matters are not being resolved at the workplace,” states Rob Thomson, WorkCover NSW acting CEO. “There is always room for continual improvement and ongoing prevention of injuries through having in place robust safe work plans and OHS policies.”

Resolution of OHS issues at the source – and in the first instance – is always the best outcome, and Thomson advises anyone with concerns about safety at work to report them immediately to their supervisor or employer. “If the matter is not satisfactorily resolved they should then raise it with their OHS representative or OHS committee,” he recommends.

Luke Anear, operations manager of Safety-Culture Australia, one of the country’s largest OHS consultancies with more than 4000 clients, says he has noticed an increase in workers contacting the firm regarding safety issues at their workplace. “Typically we would receive one complaint every couple of months in previous years, however we now receive one every ten days or so,” he says.

In most cases workers are encouraged to discuss the matter with their supervisor or company OHS officer. If they have not received a satisfactory response, workers are then referred to the relevant government department, according to Anear.

The most common OHS whistleblowing issues are in relation to food-handling practices and the construction industry, he explains. “We are also contacted by a small number of apprentices or junior employees who feel they are the subject of workplace bullying. Considering our role is to work with employers to help them to comply with legislation and provide a safe work environment, the sampling of workers that contacts us is a tiny percentage of what is a larger majority,” he believes.
Workplace health and safety is best dealt with in an open and collaborative manner, but there are times when employer resistance to change makes whistleblowing necessary, according to ACTU OHS/ workers compensation officer Jarrod Moran.

Positive safety outcomes occur when employers consult with workers and their representatives, and he says it is a far better outcome for all parties that safety hazards are raised in an open way so that they can be eliminated and workers protected. “Whistleblowing is the result of a breakdown of communication and failure by employers to serious deal with risks and hazards.”

Reporting incidents is vital to the effective operation of OHS legislation, and Moran says reports of dangerous incidents, even when no injuries result, can provide regulators with information to warrant further investigation of a workplace.

The reporting process will also reinforce the importance of taking account of ‘near misses’ as well as injuries to the employer, he explains. These requirements should be consistent, sufficiently broad in scope and well-defined, while incident reporting should be the subject of education programs and strategic auditing – with failure to report being treated as a serious offence.

“A number of employers tried to use the Howard Government’s Workplace Relations Act 1996 to defeat complaints of victimisation,” he recalls. “For example, a worker in NSW was dismissed after he raised concerns about the OHS risk assessment process in a jobsite risk analysis required by his employer. This was overturned by a court, which said it was in the public interest to protect the freedom of workers to raise health and safety issues in the workplace.”

In another case, a health and safety representative at a Victorian factory successfully sought reinstatement from the Federal Court when he was dismissed after complaining to his union that constant surveillance of his activities and discussions with other workers by the manager amounted to bullying and harassment.

“But the ACTU believes the cases coming before the courts represent only a fraction of the problems actually occurring,” Moran admits.

Despite the good intentions and efforts of regulators such as WorkCover, OHS whistleblowing is still a contentious issue within some workplaces. While there is a general endorsement and acceptance of whistleblowing procedures in the workplace, individual employees who blow the whistle must carefully consider the evidence they have and the strength of their argument, according to John Ninness, principal consultant of OHS consultancy Ninness Consulting.

“It is my belief that there is still a reluctance for employees to blow the whistle on OHS issues, or other workplace matters for that matter,” he says. “While workers understand that they can blow a whistle, they are reluctant to because of job reprisals or subtle bullying that may follow … My experience shows that many internal whistleblowing schemes do not really produce positive outcomes for employees.”

Whistleblowers seldom win against entrenched cultures. Earlier studies have found that about 62 per cent of whistleblowers lose their jobs and about 18 per cent receive transfers or reprisals, and Ninness cites research which has found that there are thresholds of tolerable personal costs associated with the practice. “These are points in which courage must overcome fear for the whistleblower. These are considerably high and below these thresholds my experience tells me that nothing happens,” he says.

Workplace safety and the cost of workplace accidents have become more prevalent in recent years, and Anear has noticed that employers are generally much more receptive to safety improvements. “Employers are more aware of the consequences of non-compliance, and, therefore, usually willing to improve safety where they can,” he says.

“I don’t believe whistleblowing is any more acceptable in terms of workplace culture, however there are now many more ways to make a complaint.”

Third-party consultants are used more regularly, and state departments are more accessible and complaints can be received anonymously in most cases. So even though whistleblowing isn’t considered “cool” at most workplaces, Anear says workers can report unsafe conditions faster and easier than in the past.

One of the most notable cases of OHS whistleblowing was that of Jayant Patel in Queensland, the rogue surgeon linked to at least 87 deaths and who was subsequently charged with a raft of crimes – including three charges of manslaughter. It was hospital staff that first blew the whistle on Patel.

The two most common forms of whistleblowing that Anear has come across have been in relation to food-handling practices and workers being asked to work in extreme heat. “We are asked questions in relation to how meat should be handled, and a common question each summer is: ‘When the temperature goes above 40 degrees are workers allowed to stop work?’”

Employees are often unclear about what their OHS obligations are, and Anear’s experience is that much of the confusion can be solved by open communication with workers.

“He cites a recent case where one of Australia’s largest petroleum retailers failed to provide ropes to secure drums of oil in the back of a delivery truck. The driver was fined by the Roads and Traffic Authority. The employee notified the company, but he was told to purchase his own rope and that he would have to personally pay the fine. “The employee was fined a second time, one week after the first incident, and by that stage he felt it was appropriate to notify the state OHS enforcement body,” Anear recounts.
The impact of whistleblowing

Ninness, who has consulted with major organisations including BHP Billiton, Queensland Rail, Comalco, Rio Tinto, Royal Australian Air Force, and the Queensland Government, says whistleblowing policies and procedures may actually serve as a negative and divisive issue in many workplaces. “In my view, as radical as it may seem, ensuring effective cultures of communication with OHS issues are more important than establishing formalised whistleblowing procedures. As society gradually accepts and endorses whistleblowing in OHS, corporate thinking may change but I think that point is a long way off,” he asserts.

Anear says whistleblowing will always have its place in relation to workplace safety, but, more often than not, matters can be resolved at an employer/employee level. “It shouldn’t be used as a first option and employers should be given a reasonable opportunity to make their workplace as safe as possible,” he insists.

“Employers respond to consequences, and the fear of having employees make complaints against them can serve as a positive motivator to improve workplace safety. I think whistleblowing will be around for the foreseeable future.”

Employers on OHS whistleblowing

OHS is a shared responsibility, according to the Australian Industry Group’s NSW director, Mark Goodsell, in which everybody has a part to play in identifying OHS hazards and risks. When employees raise safety issues, this is part of a normal risk management and hazard identification system and he says most good companies would encourage employees to do this. “Where employees raise concerns where a company hasn’t fixed a problem, then obviously that is a different kettle of fish and something of concern,” Goodsell says.

To avoid employees blowing the OHS whistle, he says workers need to understand the appropriate process of raising an issue with their manager or company. “Saying ‘I am going to report you to the authorities’ should not be the first way of raising OHS matters with the management of a company,” Goodsell states.

“Both employers and employees have to understand that raising issues in a proper and respectable way is going to get the problem fixed more quickly, so it’s important to have an environment and culture that supports that rather than having things swept under the carpet.”

Goodsell is reluctant to use the term “whistleblowing” because he does not believe it helps in building bridges between management and workers. “I am reluctant to use the term, but where an organisation has an example of this, the first thing they should do is to go back and look at their OHS systems and processes and ask themselves: ‘Why did the person feel the need to blow a whistle rather than follow an established procedure?’”

In some industries, Goodsell says, there are agendas which sometimes run contrary to good safety, but he says these are in the minority and most companies are conscious of the need for safety above industrial agendas.

“I think we can all do better,” he believes. “While most companies have an open culture that encourages employees to raise OHS issues, in reality there are sometimes pressures on companies to do all sorts of things which may lead to a gap between what is meant to happen and what does happen. In those circumstances management needs to make sure they walk the talk about safety culture and genuinely encourage people to raise issues in a timely and constructive way.”

“Management needs to make sure they walk the talk about safety culture and genuinely encourage people to raise issues in a timely and constructive way”

Mark Goodsell, Australian Industry Group’s NSW director
Putting a finger on workers’ compensation fraud

Fraudulent workers’ compensation claims have long been a thorn in the side of employers and their insurers. Craig Donaldson looks at some of the latest issues and trends in such fraud and asks what employers can do about it.
Workers’ compensation fraud is probably rarer than most people think. Contrary to the popular opinion espoused by programs such as *Today Tonight* or *A Current Affair*, fraudulent workers’ compensation claims are not as widespread or rampant as such learned media outlets purport.

A number of experts in the field point to both quantitative data and provide qualitative feedback as evidence.

In NSW, for example, more than 300 cases of potential workers’ compensation fraud were referred to the fraud investigation branch at WorkCover NSW’s workers’ compensation division in 2008/09. As a result, there were 13 successful prosecutions resulting in convictions, in addition to 17 cautions and 14 warnings being issued.

Vardanega Roberts Solicitors senior associate Eric Kranz, who specialises in workers’ compensation, says fraudulent claims exist, but are not as common as one may think. Cases where a worker who sustains an injury on the sporting field on a Saturday and then claims to have injured themselves at work on the following Monday morning, for example, represent only a small and high-profile proportion of what fraud involves, he asserts.

“In reality fraud is much more sinister and secret than this and extends beyond the obvious,” he says. “It can extend to fraudulent alterations by a worker of a medical certificate, fraudulent invoicing by service providers or by employers deliberately understating their wages. It is in such areas that the bulk of fraudulent activity exists.”

Kranz, who has also worked as a corporate solicitor for a large Australian insurer, says such activity is much more difficult to uncover and to prove as comprising a fraud. A single overstated invoice can appear as an honest mistake, while an altered medical certificate increasing a period of incapacity from four to 14 weeks can become an administrative error or be explained away by illegible handwriting. “The only true measure of the volume of fraudulent activity is through the successful prosecution of a fraudster,” he says.

Geoff Dixon, director of WCD Workers Compensation, has more than 20 years’ experience in the workers’ compensation consulting arena. “From our perspective the level of fraudulent claims is minuscule in comparison to the total volume of claims we see,” he observes.

Dixon notes that employers often confuse fraudulent with difficult to manage claims or claims arising from difficult or unusual circumstances. Difficult claims may be those where the injury may have occurred from a combination of events and circumstances, including work or personal activity or both.

Australian workers’ compensation schemes are “no fault” and only require that work has had a significant level of contribution to the claimed injury, he says. If the definition of fraud is broadened to capture those that include claimants that drag out their recovery, fight against returning to their pre-injury duties or exhibit a real inflexibility with respect to co-operatively returning to work, “then we have seen plenty of these”, Dixon declares.

“At the same time, we also see employers who do nothing to assist in the process and in fact alienate injured workers…”

**Psychological claims**

While there has not been any significant increase in overtly fraudulent workers’ compensation, there has been a significant rise in the number of psychological claims in which a worker freely cites “bullying and harassment”, according to Dino Zanella, principal consultant of Accent Risk Management. Such claims lead to extended periods of time off work, when, in fact, the employer is acting reasonably and managing the person as they should be. “This has resulted in an escalation of claims and an over-reaction by insurers and WorkCover whenever a worker chooses to use these words,” he says.

Zanella, who has more than 25 years’ experience in the industry, says the arbitration system provides no real support because a worker can throw up many excuses unchallenged, and again, their employer is often caught short by limited timeframes in which to investigate or limited opportunities to obtain pertinent medical/factual information. “Both in NSW and Victoria the employer has been abandoned by WorkCover and the arbitrators whenever these matters surface,” he laments.

What is also frustrating, Zanella says, is the lack of access to any factual information obtained by insurers. “They may give you a very minimal summary, but again, the employer is forced to defend cases without having full access to allegations or information as provided by the worker whereby the insurer and arbitrator base emphasis upon when determining the matter,” he says.

As such, most employers feel that they are “guilty without trial” and have to prove their innocence, he says. “Such is the emphasis on provisional liability and payment of claims. The employer is then obligated to find alternate employment when, in the majority of matters, they may have acted appropriately in the first place,” he notes.

“We have seen many instances where a worker is portraying a serious injury and capacity, only to return to work shortly after they have received their hefty common law settlement”
The cost of workers’ compensation fraud

Costs can vary significantly from claim to claim, in Kranz’s experience. In NSW, according to the WorkCover NSW Annual Report 2007/08, about 140,000 workplace injuries were reported during 2006/2007. For example, a single fraudulent invoice for $100 on every claim lodged in NSW can cost the NSW scheme millions, he says.

“A fraudulent claim by a worker alleging that a Saturday sporting injury happened at work could cost an employer many thousands in increased premiums alone, as well as significant administration costs. Some employers have suffered significant financial hardship as a result; such costs also escalate through the system,” he points out.

Prolonged absence from work due to unnecessary absenteeism or time off work is a significant cost to any employer, not only in lost productivity but also through increased premiums, the additional cost of covering that employee and the impact on other staff and morale, according to Dixon.

There is also the message it sends in that other employees may see fraudulent or malingering employees benefitting from the system. “We have seen instances where a string of claims manifest from workplaces where the risks and underlying safety systems are no different from other workplaces where injuries are not sustained,” he explains.

“Furthermore, there is also the impact on winning contracts as, more often than not now, tenders require the applicant to state their workers’ compensation history and premium rate. Thus a bad history could lose them the contract.”

Deterring fraudulent claims

Workers’ compensation management needs to start pre-injury, pre-claim and preferably at the commencement of the employment relationship during induction, according to Dixon. There are a number of steps involved in this process:

• Create expectations in the workforce around compensation and return-to-work processes, explain the roles of the company, insurer and providers, explain the expectations the company has of the worker and make sure you keep up to the expectations.
• Implement sound incident management processes - including incident investigation. That way you can intervene quickly on any potential issues as soon as you are aware of them.
• Use quality pre-employment medicals and appropriate allocation of tasks based on medical evidence.
• Document, document, document. Having information at the onset of the incident/claim is paramount to helping to counter the claim, or, at the very least, minimise its damage.
• Well trained and experienced claims and injury management staff onsite will be able to identify and counter such claims.
• Ensure that all staff members are aware that they will be looked after if the incident and claims processes, but that fraudulent or inappropriate activity will not be tolerated.
• Strong communication with the business is important at all levels so staff understand the process, what to look out for and who to advise in the event of potential fraud.
• Build a strong, productive and collaborative relationship with the insurer and ensure that they have an understanding of the business and the issues so they can make a sound decision.
• Ensure that a good rapport is developed with the treating practitioners and ensure that they are provided with all relevant information so that they have both sides of the story. Meetings with the worker at their doctor’s rooms are a great forum in which to tease out and stop fraudulent claims or malingering, because a worker is not likely to lie to you in front of their doctor.

Opinion is divided as to whether or not the practice of some law firms offering “no win no fee” with regards to workers’ compensation claims actually encourages fraud. There are certainly solicitors that encourage and orchestrate workers to play the system, advising them not to return to work and instead adopt a sick role in an attempt to increase their compensation entitlement, WCD Workers Compensation director Geoff Dixon believes.

“We have seen many instances where a worker is portraying a serious injury and capacity, only to return to work shortly after they have received their hefty common law settlement,” he states.

Dino Zanella, principal consultant of Accent Risk Management, says it is “most definitely” the case that law firms encourage fraudulent workers’ compensation claims. The number of matters going to arbitration for excessive whole person impairment claims is rising, he says, thanks to “generous” doctors who escalate the percentage losses - which either forces the insurer to pay a higher sum or results in matters going to arbitration.

However, Vardanega Roberts Solicitors senior associate Eric Kranz says litigation probably encourages claimants to become less interested in workplace rehabilitation or return to work. In NSW, the legislation provides that a worker cannot be charged legal fees for an unsuccessful litigated workers’ compensation claim in the Workers Compensation Commission. “If the claim is fraudulent, a worker could be made to personally pay the costs of an employer or insurer,” he cautions.

Geoff Dixon, director of WCD Workers Compensation, has seen a number of less than convincing workers’ compensation claims over the years:

A claimant turned up to court wearing his work uniform and janitor’s keys while vehemently denying that he was working.

In another case, a claimant denied working while claiming benefits, but was found to be working for the brother-in-law of the first employer.

There was another unfortunate instance where a claimant forged their medical certificates and was then sacked for serious and wilful misconduct. The claimant then sued for unfair dismissal to be reinstated and have their benefit entitlement restored. “These are the types of claims that generate a lot of coverage and create a significant amount of scepticism with many employers, but we can safely say that they are in the extreme minority,” says Dixon.
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